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Entrapment: The Myth of the Model Penal Code in Pennsylvania

Paul F. George

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I. Introduction

On June 6, 1973, Pennsylvania Crimes Code Section 313, on entrapment, became effective.[1] Since it is modeled after section 2.13 of the Model Penal Code,[2] commentators believed section 313 to overrule prior Pennsylvania law on entrapment and to represent a legislative defection from the entrapment test accepted by the majority of American jurisdictions.[3] The Pennsylvania Superior Court, however, is divided. That court currently employs two incompatible interpretations of section 313: one approach that adheres to pre-code decisions and another holds that these cases are overruled.[4] The purpose of sections I through III of this comment is to define the source of this inconsistency and, through the use of accepted rules of statutory construction, resolve the division.[5] Section IV addresses placement of the burden of proof in an entrapment case. This question, much like the test for entrapment, has been the subject of misconceptions and conflicting interpretations.[6]

A. The Approaches to Entrapment

Jurisdictions that have adopted the entrapment defense are sharply divided over its application and rationale.[7] The majority of

1. Crimes and Offenses Act of December 6, 1972, 18 PA. CONS. STAT. ANN. § 313 (Purdon 1973).

2. MODEL PENAL CODE § 2.13 (Official Draft, 1962).

3. Park, *The Entrapment Controversy,* 60 MINN. L. REV. 163, 168 n.16 (1976); Ranney, *The Entrapment Defense — What Hath the Model Penal Code Wrought,?* 16 DUQ. L. REV. 157, 158 (1977-78); S. TOLL, PENNSYLVANIA CRIMES CODE ANNOTATED 146 (1974); Toll, *Practitioner's Guide to Defenses Under the New Pennsylvania Crimes Code,* 12 DUQ. L. REV. 849, 859 (1974).

4. *See* notes 44-61 and accompanying text *infra.*

5. Pennsylvania's rules for statutory construction and interpretation have been codified by the Statutory Construction Act of 1972, 1 PA. CONS. STAT. ANN. § 1191 (Purdon Supp. 1979).

6. *See* notes 112-139 and accompanying text *infra.*

7. Tennessee has apparently not decided to adopt the defense. *See* Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1951); Bryant v. State, 549 S.W.2d 956 (Crim. App. 1977). New York has only recently statutorily adopted the defense. N.Y. PENAL LAW § 40.05 (Consol. 1977). *See* 3 People v. Schacher, 47 N.Y.S.2d 371 (Magis. Ct. 1944), in which the court stated flatly that "it is well settled that entrapment is not recognized as a defense in New York State." *Id.* at 372. The Supreme Court of New Hampshire has noted that all other American jurisdictions recognize the defense. State v. Campbell, 110 N.H. 238, 240, 265 A.2d 11, 13 (1970). For a

American jurisdictions exempt an entrapped defendant from conviction on the basis of an implied exception to the literal words of the violated criminal statute:[8] "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."[9] Upon this premise, the defense is established "when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[10] The defense is successful, therefore, only upon a determination that police coercion constituted the sole cause of the defendant's misconduct.[11] Thus, it must be shown that the defendant was not predisposed to commit the crime. "[I]f the accused asserts that he is a lamb who has been led astray he must be prepared to face evidence that he is a wolf on the prowl."[12] Courts applying this view of the defense must, therefore, address two issues: (1) whether the conduct of the government agent induced the defendant into committing the crime, and (2) whether the defendant was himself predisposed to engage in the unlawful conduct.[13] Since the determination of the motivations of the defendant requires subjective analysis of his character,[14] the majority position of entrap-

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history of the entrapment defense see De Feo, *Entrapment As a Defense to Criminal Responsibility, Its History, Theory and Application,* 1 U. S.F. L. REV. 243 (1967).

8. An example of this reasoning is given by LaFave and Scott:

> Thus although the statute broadly stated it to be a crime for anyone to sell liquor to anyone, the legislator did not really intend the statute to cover a sale which came about as a result of entrapment by a government agent; so the statute should read that it is a crime for anyone to sell liquor to anyone, except when entrapped by a government agent.

W. LAFAVE & A. SCOTT, CRIMINAL LAW 372 (1978). The example is based on the facts of Sorrells v. United States, 287 U.S. 435 (1932).

9. Sherman v. United States, 356 U.S. 369, 372 (1958).

10. Sorrells v. United States, 287 U.S. 435, 442 (1932). For a more recent United States Supreme Court discussion of this defense, *see* United States v. Russell, 411 U.S. 423 (1973).

11. MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

12. Gorin v. United States, 313 F.2d 641, 653 (1st Cir. 1963). Evidence of the defendant's character must be admissible evidence, not mere hearsay or suspicion. *See* United States v. Washington, 20 F.2d 160 (D.C. Neb. 1927). *Cf.* Heath v. United States, 169 F.2d 1007 (10th Cir. 1948). *But see* Trice v. United States, 211 F.2d 513 (9th Cir. 1954), *cert. denied,* 346 U.S. 900 (1956), in which the court held that the government could present information which led officials to believe that the defendant, an alleged narcotics dealer, was engaged in criminal activity. Accordingly the government, to rebut the entrapment defense, presented the testimony of a narcotics officer concerning information he received from various informers which led tbe government to initiate the alleged entrapment. 211 F.2d at 519.

13. In the words of Chief Justice Warren: "On the one hand at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subject to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." Sherman v. United States, 356 U.S. 369, 373 (1958).

14. This position is premised on the belief that predisposed defendants are largely professional criminals. Freeing them in order to discipline the police is thought too great a price to pay. Moreover, when officers deal with the criminally disposed, they may find it necessary to employ methods that would be inappropriate if directed at the innocent. *See* MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959); DeFeo, *Entrapment As a Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U. S.F. L. REV. 243 (1967).

ment is often termed the subjective approach to entrapment.[15]

In contrast to the majority position, the minority view on entrapment does not consider the defendant's character and predisposition relevant to a determination of the defense, but instead limits inquiry to the conduct of the law enforcement officers.[16] Courts applying this approach refuse to convict an entrapped defendant not because his conduct falls outside the proscription of a statute, but because methods employed by the government to bring about his conviction cannot be countenanced by a court of law.[17] Since the defense is based solely on a desire to deter police misconduct, the defendant's character and predisposition are not considered.[18] "[F]or my part," said Justice Frankfurter, a leading proponent of this position, "I think it is a less [*sic*] evil that some criminals should escape than that the Government should play an ignoble part."[19]

Whether government has indeed "played an ignoble part" is objectively determined by evaluating the probable effect the police conduct would have had if it had been targeted toward a "normally law abiding person."[20] If the police conduct creates a substantial risk that the crime would have been committed by a person "other than [one] ready to commit it," an entrapment has occurred and the inquiry of the court is over.[21] As noted, whether it in fact caused the defendant to commit the crime is irrelevant. The defense is available "even if his guilt be admitted."[22] Because the minority position analyzes the alleged interaction between police and defendant without regard to the character or propensities of the defendant, this position is known as the objective approach to entrapment.[23]

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15. Park, *The Entrapment Controversy,* 60 MINN. L. REV. 163, 166 (1976).

16. MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

17. Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

18. *See* United States v. Russell, 411 U.S. 423 (1973) (Douglas, J., dissenting); Sherman v. United States, 356 U.S. 369 (1958) (Frankfurter, J., concurring).)

19. Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). Justice Frankfurter quoted Justice Holmes' opinion in Olmstead v. United States, 277 U.S. 438, 470 (1927) (Holmes, J., concurring). In *Olmstead,* Justice Holmes addressed the use of evidence in a criminal trial that the government had obtained through a secret wire tap.

20. UNITED STATES NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971).

21. MODEL PENAL CODE § 213 (Official Draft, 1962). Because the standard by which the police conduct is judged is a hypothetical law abiding person, this defense has also been called the "Hypothetical-Person Defense". Park, *supra* note 3, at 171.

22. Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

23. The reasoning for this position as it appears in the Comment to the Model Penal Code is as follows:

> If the defense is available only to persons who are "innocent" the full deterrent effect of the defense is undermined. Police conduct toward a particular defendant may be seriously objectionable even though he entertained a purpose to commit crime prior to any inducement by officials. Law enforcement officials may feel free to employ forbidden methods if the "innocent" are freed but the habitual offenders, in whom the police have the greatest interest, will nevertheless be punished. . . . The very notion that certain police conduct may be improper in relation to the "innocent" but acceptable when addressed to the "guilty" seems incompatible with the ideal of equality before the law. . . . Further, to permit the use against previously convicted

B. The Pre-Code Pennsylvania Law of Entrapment

The defense of entrapment in Pennsylvania originated in *Commonwealth v. Wasson,* a superior court case decided in April, 1910.[24] This decision held that a court should acquit a defendant as a matter of public policy when he had been persuaded to engage in criminal conduct "by immoral and illegal detective methods."[25] The court noted, however, that judicial tolerance of particular investigative methods would depend upon the character of the particular defendant. The court stated: "Again, in considering the question of public policy the clear distinction founded on principle as well as authority, is to be observed between measures used to entrap a person into crime . . . and artifice used to detect persons suspected of being engaged in criminal practices. . . ."[26]

Subsequent appellate court decisions followed *Wasson* by continuing the distinction between innocent persons being lead by police into crime, and police detection of those already engaged in criminal conduct. In *Commonwealth v. Kutler,*[27] the superior court rejected the argument that the jury should have been instructed not to con-

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persons of police measures not permitted toward the rest of society is to fix a permanent status of criminality against the hopes of enlightened penology.

MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959). This position, however, has been criticized because the court's focus on police conduct might allow an "innocent" defendant to be convicted: "It is recognized that this objective test . . . may work an injustice in particular cases. . . . [P]ersons who were not predisposed to commit crime may be convicted when the police conduct is not so offensive as to violate the statutory standard for entrapment." 1 U.S. COMMISSION ON REFORM OF FEDERAL LAWS, WORKING PAPERS 306 (1970).

This criticism, however, is unsound. Defendants whose crime results from an entrapment stand in the same moral position as those who are not entrapped but persuaded by other persons to commit their offense. MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959). The culpable element of any crime is the intent to commit it and it matters little where the intent to commit it originated. Most courts, even under the subjective formulation of the defense, distinguish between the intent to commit the crime, or the blameworthy element of the criminal activity, and the origin of intent for the purposes of the entrapment defense. Thus, when the defense of entrapment is asserted, there are no "innocent" defendants, under either formulation of the defense. Therefore, there can be no injustice, as far as that defendant is concerned, when his defense fails. *See* Commonwealth v. Loccisano, 243 Pa. Super. Ct. 522, 366 A.2d 276 (1976) (Cercone, J., dissenting). *See also* notes 111-141 and accompanying text *infra.*

Commentary overwhelmingly supports the objective formulation of the entrapment defense. *See* Park, *supra* note 3, at 167 n.13. For commentary supporting the objective formulation of the entrapment defense, *see* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 YALE L.J. 1091 (1951); Goldstin, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain,* 84 YALE L.J. 683, 687-90 (1975); McLean, *Informers and Agent Provocuteurs,* 1969 CRIM. L. REV. 527 (1969); Schecter, *Police Procedure and the Accusatorial Principle,* 3 CRIM. L. BULL. 521 (1967); L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME 265-72 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution,* 28 FORDHAM L. REV. 399 (1959); 1 U.S. COMMISSION ON REFORM OF FEDERAL LAWS, *supra* note 23, at 320. For commentary supporting the subjective analysis of entrapment *see* DeFeo, *supra* note 7; Park, *supra* note 3.

24. 42 Pa. Super. Ct. 38 (1910).

25. *Id.* at 57.

26. *Id.*

27. 173 Pa. Super. Ct. 153, 96 A.2d 160 (1953).

sider the defendant's predisposition to commit the charged offense, but rather to determine only the acceptability of the methods employed by the police that resulted in defendant's arrest.[28] In *Commonwealth v. Werner,*[29] the superior court noted that the test for entrapment in Pennsylvania was "whether criminal design was created by the conduct of the public officials, or whether the officials merely created an opportunity which a person already disposed to commit crime sought to exploit."[30]

Thus, prior to June 1973, success of the entrapment defense in Pennsylvania depended upon a finding that the defendant was not predisposed to commit crime.[31] Pre-code Pennsylvania law is more thoroughly explained below.[32]

C. *The Model Penal Code and the Origin of the Pennsylvania Crimes Code*

Contrary to the subjective approach to entrapment that was adopted by the judiciary in Pennsylvania, the American Law Institute endorsed an objective formulation of the defense.[33] The drafters of the Model Penal Code originally offered both subjective and objective positions in the Tentative Drafts, and attached to these formulations comments explaining the history and reasoning underlying both approaches. The Institute, however, finally endorsed the objective approach[34] and published only that formulation in the

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28. *Id.* at 157, 96 A.2d at 162.
29. 188 Pa. Super. Ct. 509, 149 A.2d 509 (1959).
30. *Id.* at 512, 144 A.2d at 511.
31. *See* Commonwealth v. Klein, 222 Pa. Super. Ct. 409, 294 A.2d 815 (1972).
32. *See* notes 76-81 and accompanying text *infra.*
33. MODEL PENAL CODE § 2.13 (Final Draft, 1962).
34. The formulations of both approaches to the entrapment defense appear in MODEL PENAL CODE § 2.10 (Tent. Draft No. 9, 1959) as follows:

> Section 2.10 Entrapment (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense he solicits, encourages, or otherwise induces another person to engage in conduct constituting such offense when he is not then otherwise disposed to do so.
>
> Alternative formulation of Subsection (1)
>
> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he solicits or encourages another person to engage in conduct constituting such offense by either:
>
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (b) employing methods of persuasion in inducement which creates a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
>
> (2) Except as provided in paragraph (3) of this section, a person prosecuted for an offense shall be acquitted if he proves that his conduct occurred in response to an entrapment [the issue of entrapment Shall be tried by the court in the absence of the jury].
>
> (3) The defense afforded by this section is unavailable in a prosecution for a crime involving conduct causing or threatening bodily injury to a person other than the person perpetrating the entrapment.

1962 Final Draft of the Model Penal Code.[35]

Within a year of the release of the Model Penal Code, the president of the Pennsylvania Bar Association appointed a special committee to consider it as substance for a new state crimes code.[36] Encouraged by the results of the committee, the Joint State Government Commission began drafting a new Pennsylvania Penal Code based on the American Law Institute's recommendations.[37] The efforts of this commission resulted in passage of the Pennsylvania Crimes Code in late 1972.[38]

D. Section 313 of the Pennsylvania Crimes Code

Section 313 of the Pennsylvania Crimes Code states in full:

§ 313. Entrapment.

(a) General Rule. — A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(b) Burden of proof. — Except as provided in subsection (c) of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment.

(c) Exception. — The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.[39]

Except for a provision in the Model Penal Code requiring the court to try an issue of entrapment to the court in the absence of the

35. MODEL PENAL CODE § 2.13 (Final Draft, 1962).

36. S. TOLL, PENNSYLVANIA CRIMES CODE ANNOTATED, Foreward (1974).

37. JOINT STATE GOV'T COMM., PROPOSED CRIMES CODE FOR PENNSYLVANIA at vii (1967). The Joint State Government Commission is a continuing agency composed of members from both houses of the General Assembly and created for the development of facts and recommendations on all phases of government for the use of the General Assembly. *See* Act of 1937, July 1, P.L. 246, *as last amended,* December 8, 1959, P.L. 1740.

38. The Pennsylvania Crimes Code is codified at 18 PA. CONS. STAT. ANN. §§ 101-7505 (Purdon 1973). For the legislative history of the Crimes Code *see* COMBINED HISTORY OF SENATE AND HOUSE BILLS SESSION OF 1972, 1633-1637, 1696-1698, 2022, 4080-4087 (1972).

39. 18 PA. CONS. STAT. ANN. § 313 (Purdon 1973).

jury,[40] section 313 is identical to section 2.13 of the Model Penal Code.[41] Given the American Law Institute's intended interpretation of section 2.13,[42] it is not surprising that commentators believed the Pennsylvania Legislature had overruled its prior judicial approach to entrapment and had statutorily adopted the Model Penal Code objective approach to the entrapment defense.[43] Entrapment decisions issued by the Pennsylvania Superior Court, however, have been sharply divided; the court has applied both the subjective and objective approaches to entrapment, apparently without recognizing the obvious conflict.

II. The Post-Code Cases

The first Pennsylvania appellate court decision interpreting section 313 is *Commonwealth v. Mott.*[44] In that case, the Pennsylvania Superior Court began its analysis by quoting subsections 313(a) and (b) in full.[45] It then stated:

> Our court has discussed entrapment in a number of cases and has stated with respect to such defense that '[t]he test, therefore, is whether criminal design was created by the conduct of the public officials, or whether the officials merely created an opportunity which a person already disposed to commit crime sought to exploit.' The prerequisite to allowing an entrapment defense are dual: a defendant not disposed to commit the crime and police conduct which may ensnare the innocent victim.[46]

This statement illustrates two obvious yet surprising aspects of the *Mott* decision. First, the court applied a subjective test for entrapment, which appears to conflict with the newly adopted, ostensibly objective approach of section 313; second, the court drew its requirements for the defense from pre-code cases, apparently interpreting section 313 as a codification of that prior law.

Unfortunately, the *Mott* decision does not reveal the basis for this interpretation of section 313. The court seemed merely to as-

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40. Pennsylvania has traditionally submitted the issue of entrapment to the jury. *See* Commonwealth v. Conway, 196 Pa. Super. Ct. 97, 173 A.2d 776 (1961); Commonwealth v. Kutler, 173 Pa. Super. Ct. 153, 96 A.2d 160 (1953). A provision of the Model Penal Code, which would have required that "[t]he issue of entrapment shall be tried by the Court in the absence of the jury", was not adopted by the legislature. MODEL PENAL CODE § 2.13(2) (Final Draft, 1962).

41. The Model Penal Code does not, however, provide the titles "General rule," "Burden of Proof," and "Exceptions." Additionally, subsections are identified by numbers instead of letters. *See* 18 PA. CONS. STAT. § 313 (1973) and MODEL PENAL CODE § 2.13 (Final Draft, 1962). In all other aspects the sections are identical.

42. *See* notes 33-35 and accompanying text *supra.*

43. *See* note 3 and accompanying text *supra.*

44. 234 Pa. Super. Ct. 52, 334 A.2d 771 (1975).

45. *Id.* at 54, 334 A.2d at 773.

46. *Id.* at 55, 334 A.2d at 773 (citations omitted). *See also* Commonwealth v. Klein, 222 Pa. Super. Ct. 409, 294 A.2d 815 (1972); Commonwealth v. Conway, 196 Pa. Super. Ct. 97, 173 A.2d 176 (1961); Commonwealth v. Werner, 188 Pa. Super. Ct. 509, 512, 149 A.2d 509, 511 (1959). *See* text accompanying notes 27-30 *supra* and notes 77-81 *infra.*

sume its result. Indeed, the *Mott* case is the first Pennsylvania decision to display "a remarkable tendency to construe statutes based upon the Model Penal Code as codifications of the subjective approach."[47]

In *Commonwealth v. Proietto,*[48] the *Mott* decision was followed in both result and approach. In *Proietto,* the Pennsylvania Superior Court held that a defendant is not entitled to an instruction on entrapment unless evidence is adduced that he was not disposed to commit the alleged crime, and that the police conduct was likely to entrap.[49] As in *Mott,* the court offered no explanation for this interpretation.

Although the superior court, in *Mott* and *Proietto,* interprets section 313 as a codification of the subjective approach to entrapment, later superior court cases strayed from that interpretation. In *Commonwealth v. Jones,*[50] the superior court stated:

> The present codification of entrapment finds its origin in Mr. Justice Frankfurter's concurring opinion in *Sherman.* . . . This test shifts attention from the record and predisposition of the particular defendants to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and

47. Park, *The Entrapment Controversy,* 60 MINN. L. REV. 163, 168 n.16 (1976). Park suggests that "[p]erhaps the derivation of the statute was not called to the court's attention." *Id.*

The *Mott* court's formulation of the entrapment defense appears to be an exercise in judicial legislation. Section 313 is apparently a codification of the objective view of entrapment, yet the court requires an absence of predisposition to commit the offense before it will make the defense available. A Pennsylvania court does not have the power to construe a statute without a showing of ambiguity. *See* Commonwealth v. Aljiu Dumas Private Detective Agency Inc., 246 Pa. Super. Ct. 140, 369 A.2d 850 (1977).

Within a month of the *Mott* decision the superior court implicitly recognized a change in the entrapment law in Pennsylvania. In Commonwealth v. Berrigan, 234 Pa. Super. Ct. 370, 343 A.2d 355 (1975), the court observed in a footnote that a different test for entrapment was applied to that case then would be applied under the existing law, since the alleged offense was committed prior to the effective date of the Pennsylvania Crimes Code. This decision was the first in a line of cases applying pre-code law yet recognizing that that law no longer applied to offenses committed after June 6, 1973. *See also* Commonwealth v. Herron, 475 Pa. 461, 380 A.2d 1228 (1977); Commonwealth v. Loccisano, 243 Pa. Super. Ct. 522, 366 A.2d 276 (1976). These cases are often cited by courts that recognize no change in the entrapment law.

In Commonwealth v. Berrigan, 234 Pa. Super. Ct. 370, 343 A.2d 355 (1975), Judge Hoffman, in support of reversal, suggested that the present law of entrapment is a balancing test, i.e., "the greater the police misconduct, the less need for lack of predisposition." *Id.* at 379, 343 A.2d at 360. Judge Hoffman's statement lacks support or further discussion, but this test has been adopted by New Mexico. State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (1972). In that case the court stated: "We agree with defendant's statement that '. . . as the part played by the state increases, the importance of the defendant's predisposition and intent decreases, until at some point entrapment as a matter of law is reached . . .' " *Id.* at 261, 501 P.2d at 1249. This approach is a compromise between the objective and subjective views of the defense. Under this test, if misconduct by government agents is too great, then the predisposition of the defendant becomes irrelevant. A subjective evaluation of the defendant's predisposition occurs only if police misconduct, as measured on an objective continuum, does not surpass a certain level of seriousness.

48. 241 Pa. Super. Ct. 385, 361 A.2d 712 (1976).

49. *Id.* at 389, 361 A.2d at 714.

50. 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976).

willing to commit crime.[51]

Clearly, the court applied the objective test for entrapment despite the result in *Proietto* three months earlier. The basis for the court's reasoning was apparently the fact that section 313 is identical to the formulation of the entrapment defense in the Model Penal Code.[52] Neither the history of the statute nor the section itself, however, is examined in the opinion. Instead the court merely assumes, perhaps reasonably, that section 313 was intended by the Pennsylvania General Assembly to be the same approach to the defense that was approved by Justice Frankfurter[53] and later codified in the Model Penal Code. Remarkably, the court fails even to suggest that any other interpretation of section 313 has ever been asserted in the Commonwealth. Nevertheless, the *Jones* decision led one commentator to remark that "courts now realize that the code provision adopted the 'objective test' of the Model Penal Code."[54] This observation was premature.

In *Commonwealth v. Clawson,*[55] decided eleven months after *Jones,* the superior court again changed its interpretation of section 313(1): "This rule requires before the defense becomes available, (1) the defendant not disposed to commit the crime and (2) police conduct likely to entrap the innocently disposed."[56] This subjective approach plainly opposes the objective reasoning of *Jones* and apparently returns to the position taken in *Mott* and *Proietto.* The *Clawson* court, however, neither recognizes this glaring shift in approach nor provides the statutory language from which it derived its test. Moreover, the court, in a footnote, admits that section 313 originated in the Model Penal Code, but gives no reason for contradicting the Code by adopting a subjective approach.[57] As in *Jones,* the court does not admit that section 313 has ever been construed in a contrary manner.

Three months later, the superior court reversed its interpretation of section 313 for the third time. Citing *Clawson,* but following *Jones,* the court, in *Commonwealth v. Manley,*[58] applied the objective approach:

> When considering a defense of entrapment, rather than focus on a particular defendant's readiness to commit the crime, we look at the police conduct to determine whether there is a substantial risk

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51. *Id.* at 310-11, 363 A.2d at 1285.
52. *See* notes 40-41 and accompanying text *supra.*
53. Sherman v. United States, 356 U.S. 369 (1958).
54. Ranney, *The Entrapment Defense — What Hath the Model Penal Code Wrought,?* 16 DUQ. L. REV. 157, 159 n.12 (1977-78).
55. 250 Pa. Super. Ct. 422, 378 A.2d 1008 (1977).
56. *Id.* at 425, 378 A.2d at 110, quoting Commonwealth v. Conway, 196 Pa. Super. Ct. 97, 104, 173 A.2d 776, 780 (1961).
57. *Id.* at 425 n.3, 378 A.2d at 110 n.3.
58. 252 Pa. Super. Ct. 77, 380 A.2d 1290 (1977).

that the offense would be committed by one innocently disposed.[59]

Thus by December 1977, two clearly defined yet contradictory interpretations of entrapment law existed in Pennsylvania. *Mott, Proietto,* and *Clawson* applied the subjective test for entrapment; *Jones* and *Manley* applied the objective standard. Later cases exacerbate this division of authority.[60] Since the superior court has promulgated two incompatible interpretations of section 313, the need for a clarification of entrapment law in Pennsylvania is obvious.[61]

III. Analysis

The object of all statutory construction is to ascertain and effectuate the intention of the legislature.[62] If a statute is clear, the plain meaning should not be disregarded under the pretext of pursuing some unstated legislative intent.[63] A careful analysis of section 313, therefore, must first address the question of whether the statute is clear on its face. An affirmative answer would terminate the inquiry.[64] Given the manifest inconsistency of judicial application of the entrapment defense, however, it is apparent that the language of section 313 is ambiguous. Therefore, inquiry into statutory meaning must turn to the former law of entrapment[65] and the legislative his-

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59. *Id.* at 87, 380 A.2d at 1294.

60. In Commonwealth v. Lee, 262 Pa. Super. Ct. 218, 396 A.2d 724 (1978), the court discussed the defense of entrapment: "The defense is available, however, and a jury charge is necessary only if there is evidence that the police conduct was likely to entrap the innocently disposed." *Id.* at 221, 396 A.2d at 725. In Commonwealth v. Stokes, 264 Pa. Super. Ct. 515, 400 A.2d 204 (1979), the court held that "there is no entrapment where, as here, the police conduct viewed objectively, did no more than afford appellant an opportunity to commit crime." *Id.* at 518, 400 A.2d at 206.

Noticeably absent from this doctrinal paper war are Pennsylvania Supreme Court decisions. The issue of the proper approach to be taken in applying the entrapment defense was only before that court once during this era of confusion. Commonwealth v. Herron, 475 Pa. 461, 380 A.2d 1228 (1977). Since the alleged offense occurred prior to the effective date of the Pennsylvania Crimes Code, the *Herron* court applied pre-code entrapment law. Nevertheless, the court's reasoning is still noteworthy. The text of the opinion gives no clue that the present law of entrapment is other than that which the court applies. Only in a footnote does the court imply that present law may be altered by section 313 of the Pennsylvania Crimes Code. The approach taken by the supreme court leaves the distinct impression that the high court is either unaware of the present confusion in entrapment law, or is intentionally avoiding the issue.

61. Predictably, lower Pennsylvania courts have also been applying divergent standards, although the subjective approach to entrapment seems the more popular. For cases applying a subjective analysis, *see* Commonwealth v. Vermeulen, 29 Bucks 252 (1976); Commonwealth v. Ogden, 77 Lack. 85 (1975); Commonwealth v. Brumbach, 97 Dauph. 7 (1974). For a case applying the objective approach, *see* Commonwealth v. Hicks, 7 D. & C.3d 136 (1978).

In Commonwealth v. Vermeulen, 29 Bucks 252 (1976), the court, although it did not mention the split of authority over the defense of entrapment, noted that it was applying the "true" test for the defense. *Id.* at 256.

62. 1 PA. CONS. STAT. ANN. § 1921(a) (Purdon Supp. 1979).

63. *Id.* § 1921(b). *See also* Schneck v. City of Philadelphia, 34 Pa. Commw. Ct. 96, 383 A.2d 227 (1978).

64. *See* City of Pittsburgh v. Roysten Serv., Inc., 37 Pa. Commw. Ct. 394, 390 A.2d 896 (1978).

65. 1 PA. CONS. STAT. ANN. § 1921(c)(5) (Purdon Supp. 1979).

tory of section 313.[66]

A. The Ambiguity of Section 313

To determine whether section 313 is ambiguous, two subsections of section 313 must be analyzed: subsection 313(a) (General Rule) and subsection 313(b) (Burden of Proof).[67] Section 313(a) defines entrapment. An entrapment occurs when a law enforcement official or his agent "induces or encourages"[68] another person to commit a crime by employing methods of persuasion or inducement that "create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."[69] This subsection clearly indicates that an objective test is to be applied to determine the success of the defense. It refers to the *risk* that police conduct will seduce an innocent person into crime, rather than whether an innocent person was in fact seduced.[70] Additionally, the words "such an offense will be committed" refer to future occurrences and to similar crimes, not to the actual offense. Thus, section 313 does not require that police *actually* lead the defendant into crime. It is sufficient that the police conduct merely "induces or encourages" him to commit the offense.

Subsection 313(b) purports to address burden of proof, but it goes further and establishes requirements for acquittal. Section 313(b) states that "a person prosecuted for an offense shall be acquitted *if* he proves by a preponderance of evidence that his conduct occurred in response to an entrapment."[71] The language of this subsection clearly indicates that merely because the police have engaged in conduct likely to entrap, the defendant does not merit acquittal. The defendant must also prove that his conduct was *in response* to that entrapment. Therefore, for a defendant to be acquitted under section 313, the police must have engaged in conduct likely to entrap and the defendant's criminal act must have been in response to that entrapment.

The legislature did not make clear the interpretation it intended courts to draw from the specific language "in response to"an entrap-

66. *Id.* § 1921(c)(7) (provides that "[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering (5) the former law, if any, . . . [or] (8) the contemporaneous legislative history."

67. *See* text accompanying note 39 *supra* for full text of section 313. Subsection 313(c) provides only that the defense of entrapment is not available to defendants who are charged with crimes of violence. It therefore has no bearing on whether section 313 is an objective or subjective formulation of the defense.

68. 18 PA. CONS. STAT. ANN. § 313 (Purdon 1973).

69. *Id.* § 313(a).

70. *See* Park, *supra* note 3, at 168 n.16. Park analyzes this language of the Model Penal Code.

71. 18 PA. CONS. STAT. ANN. § 313(b) (emphasis added). *See* text accompanying note 39 *supra* for full text of section 313(b).

ment. Perhaps the legislature merely intended this language to indicate that the defendant has the burden of proving that he was the target of police coercion prior to his commission of the crime. Yet, subsection 313(a) already mandates that the police conduct must have induced or encouraged the defendant. Therefore, if the legislature only intended that defendant prove that he was the target of police coercion, this intention could have been served if subsection 313(b) required defendant to prove only that he was entrapped. The words "in response to" are redundant.

The legislature must have intended that this language be given a different meaning.[72] Requiring the defendant to prove that he was acting in response to entrapping police conduct also requires proof that he was not acting in response to any other element, such as the opportunity to commit the crime, which was present at the time he was subject to police coercion. The legislature intended to require more than a mere showing that the defendant was "encouraged or induced" to engage in crime. He must also show that he was not "stand[ing] ready to break the law when the occasion [arose]. . . ."[73] This inquiry requires subjective determination of defendant's motivations.

Thus, section 313 is susceptible of interpretation as either a subjective or an objective approach to entrapment. Subsection 313(a) requires an objective determination of the *risk* of entrapment, while subsection 313(b) requires a subjective analysis to determine whether the defendant acted *in response* to an actual entrapment. Moreover, the superior court's divergent interpretations present substantial practical evidence that the statute is ambiguous. Consequently, to determine the intended construction of section 313, settled rules of statutory interpretation require consideration of pre-code[74] law as well as the legislative history underlying the statute.[75]

B. Pre-Code Formulation of the Entrapment Defense

Commonwealth v. Conway[76] is the leading case defining pre-code entrapment law. In that case, the Pennsylvania Superior Court addressed whether the defense of entrapment should be submitted to the jury when the defendant has never been convicted of the type of

72. In construing the language of a statute, a court must assume that the legislature intended that every word of the statute would have effect. The court, therefore, cannot assume that the legislature is using repetitive or superfluous language. *See* Commonwealth v. Driscoll, 485 Pa. 99, 401 A.2d 312 (1979). *See also* Commonwealth v. Hill, 481 Pa. 37, 391 A.2d 1303 (1978), in which the court stated that language in a statute must be interpreted in a manner designed to give effect to each and every provision. *Id.* at 42 n.6, 391 A.2d at 1306 n.6.

73. Commonwealth v. Conway, 196 Pa. Super. Ct. 97, 102, 173 A.2d 776, 779 (1961).

74. 1 PA. CONS. STAT. ANN. § 1921(c)(5) (Purdon Supp. 1979).

75. *Id.* § 1921(c)(7).

76. 196 Pa. Super. Ct. 97, 173 A.2d 776 (1961).

offense charged, yet evidence of police coercion is minimal.[77] The court began its discussion of this issue by examining both the minority and majority approaches to the defense and expressing its dissatisfaction with both formulations, particularly as codified in the Tentative Draft of the Model Penal Code.[78] The Code's subjective formulation emphasizes the innocence of defendant's character, but also requires some conduct by law enforcement officials that merits disapproval. It provides no standard, however, by which the acceptability of police conduct is to be judged. The objective formulation provides this missing guidance, but it is also available to predisposed defendants and is therefore inconsistent with Pennsylvania law.[79] Consequently, to arrive at a clear formulation of Pennsylvania law the court drew from *both* entrapment formulations what it considered to be their better elements: a clear standard of measure to determine the acceptability of police conduct, and the requirement of actual causation. The superior court stated:

> The defense of entrapment in Pennsylvania, as derived from our own cases in the light of the other authorities mentioned, arises only when a law enforcement officer, by employing methods of persuasion or inducement which create a substantial risk that persons not otherwise ready to commit the criminal act will do so, actually induces such a person to commit the act.[80]

This unusual statement of a subjective approach to entrapment[81] is very similar to the subjective interpretation of section 313. Both formulations require police conduct likely to entrap the innocently disposed. The formulations differ slightly, however, in their description of the "subjective" inquiry. *Conway* requires actual *inducement* and section 313 requires actual *response*. Nevertheless, because the difference between the two formulations turns only on the interpretation of these two words, the *Conway* statement of the de-

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77. *Id.* at 101, 173 A.2d at 777. The court resolved this issue by holding that if no evidence of defendant's predisposition to commit the crime exists and there is some evidence of police coercion, the defense should be submitted to the jury, but with "proper caution as to its limits." *Id.* at 104, 173 A.2d at 780. *See* note 80 and accompanying text *infra* for the court's formulation of the defense's limitations.

78. *Id.* at 103, 173 A.2d at 779. Both formulations of the defense appear at note 34 *supra.*

79. *Id.* The court's opinion reflects criticisms that appear in a law review note cited by the court. *See* Note, *Entrapment,* 73 HARV. L. REV. 1333 (1959-60).

80. 196 Pa. Super. Ct. at 103-04, 173 A.2d at 779.

81. Compare the language of the *Conway* formulation of the entrapment defense to the wording of Illinois' codified subjective approach to entrapment. In Illinois, an entrapment occurs "if [the defendant]s conduct is incited or induced by a public officer or employee or agent of either, for the purpose of obtaining evidence for the prosecution of such person." ILL. ANN. STAT. ch. 38, § 7-12 (Smith-Hurd 1972). Indiana's codification of the entrapment defense states that "[i]t is a defense that the prohibited conduct of the person was the product of a law-enforcement officer . . . using persuasion or other means likely to cause the person to engage in the conduct. . . ." IND. CODE § 35-41-3-9 (1976). Note that neither of these formulations of the subjective approach to entrapment requires an objective evaluation of police conduct, as in the *Conway* formulation. For other codifications of the subjective approach to the defense *see* CONN. GEN. STAT. § 53a-15 (1977); DEL. CODE ANN. tit. 11, § 432 (1974); FLA. STAT. § 812.028 (1981 Supp.); GA. CODE § 26-905 (1975); OR. REV. STAT. § 161.275 (1977).

fense lends substantial credibility to the proposition that the legislature intended section 313 to be merely a codification of prior Pennsylvania law.

C. Legislative History

Because section 313 of the Pennsylvania Crimes Code is identical to section 2.13 of the Model Penal Code, substantial support exists for the view that the General Assembly intended section 313 to be a codification of the Model Penal Code's objective approach to entrapment.[82] Comprehensive analysis, however, must address legislative history as well.[83]

The legislative record of the Crimes Code[84] offers the least assistance in discerning the legislative purpose of specific sections of the code. The debates concerning passage of the Crimes Code cover less than fourteen pages of the Senate and House Journals combined.[85] At no time did either house specifically debate section 313.

The official comments of the Joint State Government Commission, on the other hand, offer some evidence of legislative intent.[86] The Commission intended these comments to set forth the purpose of code provisions and to guard against misconstruction.[87] Because other evidence of legislative intent is lacking, these comments are given great weight in ascertaining the legislative purpose of section 313.[88]

The Commission comment concerning section 313 states in full:

> This section is derived from Section 2.13 of the Model Penal Code and is generally in accord with existing law. Existing law of entrapment is set forth in Commonwealth v. Conway, 196 Pa. Superior Ct. 97 (1961), where the court briefly discussed the Model Penal Code provision and concluded at page 103: "The defense of entrapment in Pennsylvania, as derived from our cases in the light of the other authorities just mentioned, arises only when a law enforcement officer, by employing methods of persuasion or inducement which create a substantial risk that persons not otherwise ready to commit the criminal act will do so, actually induces such a person to commit the act." The court went on to say that

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82. *See* notes 39-43 and accompanying text *supra.*

83. 1 PA. CONS. STAT. ANN. § 1921(c)(7) (Purdon Supp. 1979).

84. The Pennsylvania Crimes Code was introduced into the general assembly as Senate Bill No. 455.

85. *See* COMMONWEALTH OF PENNSYLVANIA LEGISLATIVE JOURNAL-SENATE, Session of 1972 at 1633-1637, 1696-1698, 2022. *See also* Commonwealth of Pennsylvania Legislative Journal-House, Session of 1972 at 4080-4087. The Pennsylvania Crimes Code was introduced into the General Assembly on March 30, 1971 and received its final ratifying vote in the House of Representatives on November 21, 1972. The Senate concurred on November 30, 1972.

86. JOINT STATE GOV'T COMM'N PROPOSED CRIMES CODE FOR PENNSYLVANIA § 213, Comment at 51 (1967).

87. S. TOLL, *supra* note 3, at vi.

88. *See* Commonwealth Dep't. of Transp. v. Gehvis, 19 Pa. Commw. Ct. 287, 339 A.2d 639 (1975), *rev'd on other grounds,* 471 Pa. 210, 369 A.2d 1271 (1977).

the defense is available where there is a defendant not disposed to commit the crime and "police conduct likely to entrap the innocently disposed." Under Pennsylvania law, the defense is submitted to the jury when the foregoing elements are present.[89]

Surprisingly, the comment indicates that the Commission interpreted section 313 to be a formulation of the majority, subjective approach to the entrapment defense. Furthermore, the Commission apparently intended this section merely to codify the existing law of entrapment and to require the same criteria for the defense that was required in *Conway*.[90] Consequently, either the Commission erroneously interpreted section 2.13 of the Model Penal Code, perhaps being deceived by the similarity between the formulation of the *Conway* court and the formulation of the American Law Institute;[91] or they correctly perceived section 2.13 to be capable of an interpretation generally in accordance with the *Conway* formulation of the defense.

Competing factors must be weighed in determining the effect of this comment on a final interpretation of section 313. The text of a statute controls in the event of conflict between the text and a commission's comments.[92] The comments of the Joint State Government Commission, however, are assumed to be the result of the study and recommendations of an able commission appointed by the Governor of the Commonwealth.[93] The comments should not, therefore, lightly be declared erroneous. Additionally, the comment adds to the already substantial evidence that section 313 is ambiguous and casts substantial doubt upon the proposition that the legislature intended that section to overrule prior entrapment law.

D. The Requirement of Clear Legislative Intent

The Pennsylvania Supreme Court has stated:

> Legislative intent to effect any departure from a firmly established policy of law must be expressed in clear and unequivocal language and well-settled and established principles of law are not to be regarded as changed unless the terms of new legislation unmistak-

89. JOINT STATE GOV'T COMM'N PROPOSED CRIMES CODE FOR PENNSYLVANIA § 213, Comment at 51 (1967).

90. *See* notes 76-81 and accompanying text *supra*.

91. *See* text accompanying notes 79-80 *supra*.

92. 1 PA. CONS. STAT. ANN. § 1939 (Purdon Supp. 1979).

93. *In re* Tarlo's Estate, 315 Pa. 321, 172 A. 139 (1934). In that case the court stated:

> The report of a commission appointed to codify the law upon a given subject is entitled to even greater weight than the report of a committee; especially is this so where the legislature enacts the exact language of the commission's draft. . . . It is impossible to conclude that the legislature in approving the language of the section as the commission had drafted it did not do so with the intent that it should have the effect which the commission designed and pointed out to the law makers.

Id. at 326, 172 A.2d at 140-41. Section 313 is identical to section 213 of the Joint State Government Committee draft.

ably and unambiguously indicate such a change.[94]

Section 313, interpreted as an objective formulation of the defense of entrapment, clearly cannot meet this standard. The decisions of *Mott* through *Manley* present substantial practical evidence that the statute is not clear on its face. Moreover, statutory analysis clearly illustrates an alternative interpretation of section 313, which requires a test for the defense that is identical to pre-code entrapment law. Finally, in light of the comment of the Joint State Government Commission, no court could conclude with certainty that the legislative history of section 313 requires an interpretation of that section in concert with the objective approach to entrapment in the Model Penal Code. The pre-code law of entrapment is not unmistakably and unambiguously overruled. The current test for entrapment is identical to the test of *Commonwealth v. Conway:* the police must engage in conduct likely to entrap the innocently disposed and the police conduct must actually induce the defendant to commit the crime.

E. Recommendations

Pennsylvania is not alone in its difficulty. The Superior Court of Utah has also interpreted a statute patterned after the Model Penal Code to require an innocently disposed defendant.[95] Only the dissent in *State v. Curtis* found the derivation of the statute determinative.[96] New York has had a similar experience.[97] The supreme

94. Delaware River Port Auth. v. Pennsylvania Pub. Utility Comm'n, 393 Pa. 639, 647, 145 A.2d 172, 175 (1958).

95. State v. Curtis, 542 P.2d 744 (Utah 1973). In that case, the Utah Supreme Court interpreted UTAH CODE ANN. § 76-2-303 (Supp. 1975) as a codification of prior state subjective entrapment law, despite the fact that the statute was clearly based on the Model Penal Code objective formulation of the defense. An entrapment occurred under the Utah statute when a law enforcement officer induced the commission of the offense by methods "creating a substantial risk that the offense would be committed by one not otherwise ready to commit it." *Id.* The word "risk" in this formulation clearly refers to the possibility of leading a person into crime, not whether in fact the police conduct corrupted an innocent person.

96. 542 P.2d 744, 747 (Utah 1973).

97. *See* People v. Calvano, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 344 (1972). The statute construed in this case, however, is a model of ambiguity. It states:

> In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant . . . and when methods used . . . were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement.

N.Y. PENAL LAW § 40.04 (Consol. 1977). At first glance, the statute seems to be a formulation of the objective approach to entrapment. The requirement that the methods used "create a substantial risk that the offense will be committed" address future conduct and are clearly an objective formulation of the defense. Yet the statute also contains language that can be interpreted as requiring a subjective inquiry. The requirement that defendant engaged in the criminal conduct "because" he was induced clearly implies actual causation, i.e., that the defendant would not have committed the crime except for the police inducement. This, of course, would require a showing that the defendant was not predisposed to commit the crime. *See* State v.

courts of North Dakota[98] and New Hampshire,[99] however, have encountered little difficulty in finding that statutes containing similar language are codifications of the objective approach to entrapment.

Although the various statutes often are derived from different proposed codifications of the defense, their slightly different language cannot explain the different results.[100] Instead, the apparent lack of willingness by the courts to make the defense available to "guilty" defendants absent a clear and unavoidable legislative mandate dictates the conflicting interpretations. The decisions by the Pennsylvania, Iowa, and New York courts indicate that none of the proposed statutes can supply the needed clarity.

The problem can be resolved in two ways. The first alternative, chosen by the state of Hawaii, is the adoption of a comment clearly explaining the legislative purpose.[101] The Hawaii Legislature has insured the adoption of the objective formulation of the Model Penal Code on the entrapment defense by using this approach.[102]

The second alternative is to adopt a clear and unambiguous statutory text. The Pennsylvania experience with the Model Penal Code clearly illustrates that many current formulations of the objective approach to entrapment contain language that can be interpreted as requiring that the defendant not be predisposed to commit the crime.[103] Clear language mandating that the defense is available to the defendant despite his predisposition is necessary. The following model is suggested:

It is a defense that the defendant was entrapped into committing

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Bacon, 114 N.H. 306, 319 A.2d 636 (1974) (similar statute interpreted as an objective formulation of the defense).

98. State v. Pfister, 264 N.W.2d 694 (N.D. 1978) (construing N.D. CENT. CODE § 12.1-05-11 (1976)).

99. State v. Bacon, 114 N.H. 306, 319 A.2d 636 (1974) (construing 5 N.H. REV. STAT. ANN. § 626.5 (Supp. 1973)). This statute is almost identical to N.Y. PENAL LAW §4005 (Consol. 1977), which has been interpreted as an objective formulation of the defense. *See* note 96 *supra.*

100. UTAH CODE ANN. § 76-2-303 (Supp. 1975), which has been interpreted as a formulation of the subjective approach, is based on the Model Penal Code. It requires police conduct "creating a substantial risk that the offense would be committed by one not otherwise ready to commit it" before an entrapment is found. *Id. See* note 94 *supra.* N.D. CENT. CODE § 12.1-05-11 (1976) is based on the Proposed Federal Crimes Code, U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702 (1971), and requires police conduct "likely to cause normally law abiding persons to commit the offense." N.D. CENT. CODE § 12.1-05-11 (1976). It has been interpreted as an objective formulation of the defense. *See* note 97 *supra.* The wording of both statutes is clearly a formulation of the objective approach to entrapment. Both address the *risk* that is created by the police coercion, not whether the police actually *caused* the defendant to commit the crime.

101. HAWAII REV. STAT. § 702-237 (Special Pamphlet) is identical to the Model Penal Code's formulation of the defense. Although the commentary accompanying the section is not actual evidence of legislative intent, it may be used as an aid in understanding the provisions of the code. HAWAII REV. STAT. § 701-105 (1976); State v. Nobriga, 56 Hawaii 75, 77, 527 P.2d 1269, 1271 (1974).

102. *See* State v. Anderson, 58 Hawaii 479, 572 P.2d 159 (1977).

103. *See* notes 67-75 and accompanying text *supra.*

> the offense. An entrapment occurs when a law enforcement official or a person acting in cooperation with such an official employs methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons not otherwise ready to commit it. The predisposition of defendant to engage in the alleged illegal activity is irrelevant to the determination of whether the defendant has been entrapped into committing the offense.

The language defining when an entrapment occurs is based on Model Penal Code Section 2.13 and clearly indicates that the issue of entrapment is to be deduced by objective inquiry.[104] The first and the last lines of the proposed section further guard against misconstruction.[105]

IV. Burden of Proof

Section 313(b) of the Pennsylvania Crimes Code states that "a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment."[106] Contrary to the statute, in *Commonwealth v. Cameron*[107] the Superior Court of Pennsylvania placed the burden on the Commonwealth to prove beyond a reasonable doubt that the defendant's alleged criminal conduct did not result from an entrapment.[108] In *Commonwealth v. Jones,*[109] however, the superior court upheld the provisions of section 313(b) and required the defendant to prove an entrapment by a preponderance of the evidence.[110] Initially, this discrepancy between *Jones* and *Cameron* appears to turn on the different approaches to the defense applied by the respective courts. *Cameron* applied a subjective test to entrapment and *Jones* applied an objective test. Close analysis, however, discloses that the distinction between the two decisions turns instead on misplaced reliance by the *Cameron* court upon the earlier superior court decision of *Commonwealth v. Loccisano,*[111] a case decided on facts that occurred prior to the effective date of the Pennsylvania Crimes Code.

A. Commonwealth v. Loccisano

In *Commonwealth v. Loccisano,*[112] the superior court addressed whether the Pennsylvania Supreme Court decision in *Commonwealth*

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104. *See* text accompanying notes 34-35 *supra.*
105. This language is derived from UTAH CODE ANN. § 76-2-303 (Supp. 1975).
106. 18 PA. CONST. STAT. ANN. § 313 (Purdon 1973). *See* text accompanying note 39 *supra.*
107. 247 Pa. Super. Ct. 435, 372 A.2d 904 (1977).
108. *Id.* at 441, 372 A.2d at 907.
109. 242 Pa. Super. Ct. 303, 363 A.2d 1281 (1976). *See* notes 50-54 *supra* for a discussion of this case.
110. *Id.* at 314, 363 A.2d at 1287.
111. 243 Pa. Super. Ct. 522, 366 A.2d 276 (1976).
112. *Id.*

v. Rose[113] required a shift of the burden of proving an entrapment from the defendant to the Commonwealth.[114] In *Rose,* the Pennsylvania Supreme Court held that in any criminal prosecution, "the Commonwealth has the unshifting burden to prove beyond a reasonable doubt all elements of the crime."[115] The question confronting the *Loccisano* court was whether the defense of entrapment negates an element of the offense, specifically, whether it negates the element of intent.[116] The court stated:

> The appellant's defense is that he had no intention of engaging in illegal activity until he was persuaded to do so by the officer's agent. *The element in dispute is criminal intent.* It is the Commonwealth's burden to present proof beyond a reasonable doubt of this element, just as it is the Commonwealth's burden to prove every element of the crime. It defies logic to require the Commonwealth to prove the presence of an element and at the same time demand that the defendant prove its absence.[117]

Thus, the *Loccisano* court held that the proof of an entrapment negates the element of intent necessary to the commission of a crime.[118] Therefore, the Commonwealth, under the *Rose* decision, has the burden of proving the absence of an entrapment beyond a reasonable doubt.[119] The dissent points out, however, that the majority's reasoning is "simply incorrect."[120] By its statement that "the element in dispute is criminal intent," the majority in *Loccisano* has mistakenly combined two distinct inquiries: (1) whether the defendant possessed the proper mens rea,[121] and (2) whether the defendant was predisposed to commit the crime.[122] Closer analysis reveals the distinction between the two issues.

Under the first inquiry, proving mens rea as an element of the offense, the prosecution need only show that defendant intended to commit the offense,[123] that is, that his conduct was purposeful.[124] This type of "intent" makes no distinction between intent that

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113. 457 Pa. 380, 321 A.2d 880 (1974).
114. 243 Pa. Super. Ct. at 535, 366 A.2d at 283.
115. 457 Pa. at 389, 321 A.2d at 884 (emphasis added).
116. 243 Pa. Super. Ct. at 535, 366 A.2d at 283.
117. *Id.* at 537, 366 A.2d at 283 (emphasis added).
118. *Id.* at 537, 366 A.2d at 284.
119. *Id.*
120. *Id.* at 538, 366 A.2d at 284.
121. Mens rea is often defined synonymously with criminal intent and is the mental state of mind that is a prerequisite to a finding of guilt for all crimes except strict liability offenses. W. LAFAVE & A. SCOTT, CRIMINAL LAW 201 (1972).
122. This inquiry addresses the question whether the police officer "implanted in the mind of an innocent person the disposition to commit the offense and induce its commission in order that the officer might prosecute him." People v. Outten, 13 Ill. 2d 21, 26, 147 N.E.2d 284, 287 (1958).
123. *See* Perkins, *Rationale of Mens Rea,* 52 HARV. L. REV. 905 (1938-29).
124. The Model Penal Code distinguishes between a purposeful action and a knowing action.

> In defining culpability a narrow distinction is drawn between acting purposely and knowingly. . . . Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the

originates in the mind of the defendant and intent that is implanted in his mind by an outside agent. If the defendant either desires the result of his criminal activity or knows that result is almost certain to occur, the intent element of the crime is satisfied and the necessary mens rea is established.[125]

In contrast to the mens rea inquiry, the "origin of intent" inquiry for purposes of determining the predisposition of a defendant does not concern itself with intent as an element of the offense.[126] When entrapment is the sole defense, the defendant concedes that he intended to commit his criminal act.[127] Instead, the "origin of intent" inquiry addresses the issue of where the idea and motivation to commit the crime was conceived.[128] If a law enforcement officer conceives of a crime, and then persuades an otherwise innocent person to engage in it, an entrapment has occurred and a defense is available. This defense, however, has nothing to do with the innocence of the defendant.[129] If parties with no connection to the government persuaded defendant to commit the alleged crime, that coercion would offer a defendant no defense.[130]

Thus, the purpose of this defense is solely to deter police misconduct.[131] For that reason, the defense has been likened to the ex-

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nature or the result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. The distinction is no doubt inconsequential for most purposes of liability.

MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1953).

125. The following definition of intent has been propounded by two commentators:

It is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances; (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

W. LAFAVE & A. SCOTT, *supra* note 120, at 196.

126. MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959). The Comment also states:

The defense does not assert that the defendant has not engaged in criminal activity nor does it truly seek to excuse or justify a criminal act. The defense is, in fact, a complaint by the accused against the state for employing a certain kind of unsavory enforcement. The accused is asking to be relieved of the consequences of his guilt by objecting to police tactics. He is a plaintiff and should be required to come forward with the evidence and to establish the main elements of his claim by a preponderance of proof.

127. The defendant concedes guilt but attempts to avoid punishment on grounds of public policy. *See* State v. Good, 110 Ohio App. 415, 165 N.E.2d 28 (1960).

128. An entrapment occurs "when the criminal design originates with the officials of the government" who then induce an innocent person to commit the crime. Sorrells v. United States, 287 U.S. 435, 442 (1932).

129. The defendant whose crime results from an entrapment is neither less reprehensible or dangerous nor more reformable or deterrable than other defendants who are properly convicted. Defendants who are aided, deceived or persuaded by police officials stand in the same moral position as those who are aided, deceived or persuaded by other persons.

MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

130. "Well settled, of course, it is that the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not an officer of the law." Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956).

131. MODEL PENAL CODE § 2.10 Comment (Tent. Draft No. 9, 1959).

clusionary rule, which also excludes clearly reliable evidence of defendant's guilt to deter future constitutional violations by government officials.[132] By its holding that the defense of entrapment negates an element of the offense, the *Loccisano* majority misconceived the purpose and rationale of the defense.

B. Commonwealth v. Cameron

In *Commonwealth v. Cameron,*[133] a case decided on facts occurring after the effective date of the Pennsylvania Crimes Code,[134] the superior court followed the *Loccisano* decision and placed the burden on the Commonwealth to prove absence of an entrapment beyond a reasonable doubt.[135] The *Cameron* court, however, engaged in no analysis of its own, but merely cited *Loccisano* to support its conclusion.[136] The court apparently assumed that *Loccisano* overruled that portion of section 313 that unambiguously places the burden of proof upon the defendant to prove the defense by a preponderance of the evidence. Since *Loccisano* could only overrule legislative enactments that "clearly, palpably and plainly" violate the Constitution,[137] the *Cameron* court's reliance on *Loccisano* is misplaced. The reasoning of the *Loccisano* court, as illustrated above, cannot meet the standard required to rebut the presumption of the constitutionality of section 313[138] because the *Loccisano* court

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132. Commonwealth v. Jones, 242 Pa. Super. Ct. 303, 314, 363 A.2d 1281, 1286 (1976).

133. 247 Pa. Super. Ct. 435, 372 A.2d 904 (1977).

134. The Pennsylvania Crimes Code became effective on June 6, 1973. 18 PA. CONS. STAT. ANN. §§ 101-7505 (Purdon 1973). The alleged offense in the *Cameron* case occurred in March, 1975. 247 Pa. Super. Ct. at 437, 372 A.2d at 905.

135. 247 Pa. Super. Ct. at 441, 372 A.2d at 907 (1977).

136. *Id.* at 441, 372 A.2d at 907.

137. Shapp v. Sloan, 480 Pa. 449, 464, 391 A.2d 595, 602 (1978). In Daly v. Commonwealth Horse Racing Comm'n, 38 Pa. Commw. Ct. 77, 391 A.2d 1134 (1978), the court noted that "all doubts will be resolved in favor of sustaining the legislation." *Id.* at 81, 291 A.2d at 1136.

138. The dissent in *Loccisano* states that: "Indeed, the error is so obvious that I have found no other court which has made it." Commonwealth v. Loccisano, 243 Pa. Super. Ct. at 540, 366 A.2d at 285 (1976) (Cercone, J., concurring and dissenting). The majority states that its result is consistent with the federal courts' view of the burden in entrapment cases. *Id.* at 537, 366 A.2d at 284. While the result is generally in accord with the allotment of the burden of proof in federal courts, the reasoning is not.

Two well-defined theories of the allotment of the burden of proof are utilized in federal courts: the bifurcated theory and the unitary theory. Under the bifurcated theory of the burden of proof, entrapment involves two issues. The first issue is whether the defendant was led or induced into committing the crime by a government agent. The burden of proving this issue is upon the defendant and he must prove it by a fair preponderance of the evidence. If the defendant is successful, the burden shifts to the government and the defense will succeed unless the government can prove beyond a reasonable doubt that the defendant was not "otherwise innocent." United States v. Braver, 450 F.2d 799, 801 n.4 (2d Cir. 1971). *See also* Gorin v. United States, 313 F.2d 641 (1st Cir. 1963).

In United States v. Watson, 489 F.2d 504 (3d Cir. 1973), a case cited by the *Loccissano* majority as being in accord with its result, the circuit court rejected the bifurcated theory in favor of the unitary theory, which required the government to disprove an entrapment beyond a reasonable doubt. The court reached this conclusion on the basis that the bifurcated theory was confusing to the jury. The court also noted that entrapment is a judicially created defense. *Id.* at 511.

reached its decision based upon an erroneous view of the entrapment defense.[139]

Moreover, the *Loccisano* court did not address the constitutional issue of placing the burden of proof upon the defendant. The court followed the guidance of the Pennsylvania Supreme Court in *Rose.*[140] Although *Rose* held that all elements of the offense must be proven by the Commonwealth beyond a reasonable doubt, the Pennsylvania Supreme Court reached its decision based upon state evidentiary law[141] and did not address the constitutional issue involved.[142] Thus, *Loccisano* cannot be considered an authority for judicial repeal of the burden of proof standard provided in subsection 313(2). The *Cameron* decision exists without authority for its placement of the burden of proof upon the Commonwealth against the clear mandate of section 313(b).

V. Conclusion

The substantial evidence that section 212 is ambiguous precludes any finding that the General Assembly clearly and unmistakably intended it to overrule prior Pennsylvania entrapment law. Section 313 should, therefore, be interpreted as a codification of the entrapment defense as formulated by the superior court in *Commonwealth v. Conway,* requiring police conduct likely to entrap the innocently disposed and the actual inducement of an otherwise innocent defendant.

The burden of proving the defense is upon the defendant. Section 313(b) clearly states that the defendant must prove by a preponderance of evidence that his unlawful conduct was in response to an entrapment. No court has yet held that this allocation of the burden of proof is inconsistent with constitutional standards.

PAUL F. GEORGE

See also United States v. Greenberg, 444 F.2d 369 (2d Cir. 1971), in which the court stated that "the defense of entrapment is primarily the implementation of a policy . . . the defense does not negative any of the essential elements of the crime." *Id.* at 372. *See also* United States v. Riley, 363 F.2d 955 (2d Cir. 1966).

139. *See* notes 116-131 and accompanying text *supra.*

140. Commonwealth v. Rose, 457 Pa. 380, 321 A.2d 880 (1974).

141. *Id.* at 389, 321 A.2d at 884.

142. The court stated:

> [O]ur decision need not rest on federal constitutional grounds. It is not necessary for us to speculate that the *Winship* requirement of proof beyond a reasonable doubt of all essential facts encompasses the disproof of other facts (such as intoxication) which, if found, would establish the existence of an essential fact (such as intent). Our determination which follows of the issue presented is in terms of state evidentiary law.

Id. at 386, 321 A.2d at 882-83. The court refers to the case of *In re* Winship, 397 U.S. 358 (1970), in which the United States Supreme Court held that the due process clause of the fourteenth amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Id.* at 364.